IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

13

No. 684.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA AND JOSEPH HAYES, THOMAS HAYES, HELEN HAYES AND MARY HAYES, MINORS, BY MARY LORDAN, GUARDIAN OF THEIR PERSONS AND ESTATES,

Plaintiff in Error,

vs.

JAMES ROLPH COMPANY AND GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, A CORPORATION.

Defendants in Error.

BRIEF OF HENRY C. HUNTER, AMICUS CURIÆ AND ATTORNEY FOR COUNCIL OF AMERICAN SHIPBUILDER'S, INC., AND NEW YORK AND NEW JERSEY DRY DOCK ASSOCIATION, AND OF JOSEPH P. CHAMBERLAIN, AMICUS CURIÆ AND ATTORNEY FOR LONGSHOREMEN'S UNION OF AMERICA.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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INDEX TO CASES CITED.

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Statement.

By leave of Court the undersigned, as *amici curiæ,* submit this brief asserting the constitutionality of the Act of Congress of June 10, 1922, 42 Stat. 634

involved in the above entitled suit and asserting in addition that the elective compensation laws of a state may apply to a longshoreman injured on a vessel or to other maritime workers so injured even without this statute. They hope that the brief may be of assistance in the decision of the important question before this Court. They represent respectively the Council of American Shipbuilders, Inc., and New York and New Jersey Dry Dock Association and the Longshoremen's Union of America. The statute and the points of law involved in this suit are of general application and the decision of the court may in future operation of the rules laid down substantially affect the interest of their members.

Undersigned believe that the question of constitutionality is covered in the brief for the plaintiffs in error and will address themselves especially to the rule as laid down in *Southern Pacific Co.* vs. *Jensen*, 244 U. S. 205, as applied in later cases.

The Council of American Shipbuilders is composed of several of the companies engaged in building and repairing ships in their shipyards situated on the Atlantic and Pacific Coasts and on the Great Lakes.

The New York and New Jersey Dry Dock Association is composed of many of the leading companies operating shipyards on the shores of the States of New York and New Jersey within the territory known as the Port of New York.

At the present time a shipyard workman, when engaged on new ship construction in the shop, on the pier, or on navigable waters, or when engaged on ship

repair work in the shop or on a pier, comes within the Workmen's Compensation Law of the State in which his employer's plant is situated. If this same workman be employed on an old ship to make repairs thereon and while it is in the dry dock of his employer, or is tied up to his employer's pier, then several of the State courts have held that he is outside the Workmen's Compensation Law and exclusively within the jurisdiction of the Admiralty Courts.

Out of those conditions have arisen confusion as to the character of a workman's employment, whether maritime or not; difficulty of determining the actual place at which an accident occurs, and disputes as to coverage by insurance.

The act of Congress of June 11, 1922, amending Sections 24 and 256 of the Judicial Code removes the confusion recited above by placing all the workmen of shipyards within the Workmens Compensation Law of the state in which their employer's yard is situated, and, therefore, the members of the Council of American Shipbuilders and of the New York and New Jersey Dry Dock Association are vitally interested in maintaining the said Act of Congress, and in establishing the rule that repair work on ships is a local matter which may be regulated by an elective State Workmen's Compensation Act.

The Longshoremen's Union of American represents 140,000 longshoremen, 60,000 of whom are in the Port of New York. More than nine-tenths of them are employed not by ships or ship-owners, but by local contracting stevedores, their work is done locally, and it is

important to them that they be subject to the local Compensation Law when on the ship, as they are covered by it for accidents occurring off the ship. Under the Act of Congress of June 10, 1922, 42 Stat. 634, permitting State Workmen's Compensation Acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels, they have been enjoying the benefits of uniformity of law in respect to their compensation both on the ship and on the shore. Their occupation is hazardous, accidents, serious in their nature, are frequent. Twenty-five per cent. of the cases heard by the Compensation Commission of the State of New York in New York City involve accidents in longshore work, a large percentage having happened on the ship. It is important that this uniformity of protection be continued and the Longshoremen's Union sees no other satisfactory way of achieving this result than to permit the application of the State Workmen's Compensation Laws to both ship and shore parts of the single job of longshore work.

Statement of the Facts.

Eugene Hayes, a stevedore, was killed by a fall into an open hatchway on September 5, 1922, while working on the steamship *West Islip* at San Francisco, in the unloading of a cargo of coal. The vessel was tied to her dock at the time of the accident, although afloat upon the navigable waters of San Francisco Bay. James Rolph Company, the defendant in error, was Hayes' employer, and was insured in defendant in

error, General Accident, Fire and Life Assurance Corporation, under a policy of workmen's compensation insurance. It had of its own accord taken out this policy in order to bring itself within the protection of the California Workmen's Compensation Act which, as to the parties in this suit, was elective. It appears that defendant in error, James Rolph Company, maintains docks and storage facilities in San Francisco to handle coal imported by it. Its office force, officers, bookkeepers, janitors, weighers, dock masters, deliverymen and wharf laborers are wholly within state jurisdiction, and subject to the local laws unless the wharf laborer happens to be injured while aboard the ship which he is temporarily engaged in unloading.

POINT I.

An Elective State Compensation Act May Apply to Longshore Work.

1. A longshore job is a unit, part done on the dock, part on the ship or barge; the land part is subject to the State Compensation Act, so that the ship is subject to State Law in respect to longshore work in every port she enters, and to apply maritime law to the part done on the ship will not protect the ship against State Laws while taking on or discharging cargo.

Southern Pacific Company v. *Jensen,* 244 U. S. 205;

State Industrial Commission v. *Nordenholt Corporation,* 259 U. S. 263.

2. Longshore work is done normally under a stevedoring contractor, a local concern, by workmen locally resident, the work is done locally; the fact is that the job done on shore is local and under local law, the part done on the vessel is also "a local matter" and may to some extent be subject to State Law.

Western Fuel Company v. *Garcia*, 257 U. S. 233.

3. An elective compensation act does not, like a compulsory compensation act, *displace* the maritime law of torts, it *supplements* and modifies it. As to maritime torts such an act is truly elective since the method used to induce the election as to land torts, the withdrawal of defenses under common law, cannot apply to maritime torts.

Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469.

4. An elective compensation act may apply to a local matter, where uniformity of maritime law is not necessary and parties electing it for a local employment will not have an action in the admiralty courts for maritime torts happening in the course of such employment.

Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469.

5. The circumstance that work is done under a maritime contract does not prevent the application of State law in case the matter affected is local and not

national in its scope; it is, however, an element to consider in determining whether uniformity of maritime law is necessary in respect to the particular matter.

Cooley v. *Board of Port Wardens,* 12 How. 299.

Morgan Railroad and Steamship Company v. *Louisiana Board of Health,* 118 U. S. 455.

Western Fuel Company v. *Garcia,* 257 U. S. 233.

Grant Smith Porter Company v. *Rohde,* 257 U. S. 469, relying on and explaining *Western Fuel Company* v. *Garcia.*

POINT II.

The rule of Southern Pacific Company v. Jensen, 244 U. S. 205, that a compulsory state compensation law may not apply to that part of the longshoreman's job done on the ship, in order to preserve uniformity of law in respect to the ship in all ports, will not prevent an elective workmen's compensation law from applying to the part of a longshore job done on the ship since, under State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, the part of the same job done on the dock is subject to state compensation law.

In the *Jensen* case the court said that the uniformity of the maritime law is not absolute. The law of the state may regulate matters subject to the admiralty law unless "it contravenes the essential purpose expressed by an act of Congress, or works material prej-

udice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Clearly no statute of Congress will be affected in the instant case if the state law takes effect. Congress has expressed its opinion that the state law should apply; the rules of the admiralty law concerned are the same as those which in the case of *Grant-Smith-Porter Co.* vs. *Rohde,* 257 U. S. 469, were supplemented by an elective state compensation act; that case involved a tort, as this involves a tort, it is the tort, not the contract law which applies. And it was held there that "Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." We will later discuss the distinction the court made between this case and the *Jensen* case, in which the act was compulsory.

In the *Jensen* case the court illustrates its position as to uniformity by this expression, "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish; and freedom of navigation be-

tween the states and the foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a material man's lien condemned in *The Roanoke". Southern Pacific Company* vs. *Jensen*, 244 U. S. 205, 217. It was the protection of the ship as an instrument of maritime commerce and the protection of maritime commerce itself, which was the object of the Court. The opinion is authority for the point that where the uniformity of law is essential to safeguard that commerce or where an interest is essentially national and not local, the admiralty law and not a state law must be applied. The point is clearly brought out in the reference to the Commerce clause which the Court makes in its opinion. "Where the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the states, such as transportation between the States, including the importation of goods from one state to another Congress can alone act upon it and provide immediate regulations. *Southern Pacific Company* vs. *Jensen*, 244 U. S. 205, at p. 217, quoting *Bowman* vs. *Chicago and Northwestern Railway Company*, 125 U. S. 465; *Cooley* vs. *Board of Port Wardens*, 12 How. 299; *Morgan Railroad & Steamship Company* vs. *Louisiana Board of Health*, 118 U. S. 455.

It is not, therefore, that the admiralty rules of tort cannot be modified or supplemented by State law. They have been so modified under the decisions in *Western Fuel Company* vs. *Garcia*, 257 U. S. 233, and

Grant Smith-Porter Ship Company vs. *Rohde*, 257 U. S. 469, but it is the *effect* or the *result* of the application of the State law in operation which determines whether it may modify or supplement admiralty law. It is necessary, therefore, not to consider the law theoretically and by itself, but the law in operation among the facts, to determine whether uniformity under the maritime law is necessary in the case affected or whether a local interest is involved and to allow a local law to take effect would help rather than impede commerce and would not destroy the uniformity of admiralty law in its essential purpose.

The quotations from the *Jensen* case make it clear that the mind of the court was preoccupied with the ship, and that in the interest of the ship, uniformity of law was insisted on. It was to protect the ship from the expense and annoyance of being subjected to a multiplicity of laws differing in every port that the New York compulsory compensation law was held unconstitutional. The court seems to have considered that by its decision it was assuring the ship uniformity of law in respect to discharging and taking on cargo in all the ports of the United States.

This work, longshore work, is not done by the crew of the ship but by local workers, hired to work only in the port, and not to accompany the ship from port to port. Their engagement is only for this local work, and they form a part of the local labor force. Part of their work is done on the dock, part on the ship. The same longshoreman may be at one moment loading his

truck on the dock, at the next on his way up the gangplank, and then depositing the load on the dock or in the hold of the ship. One day he may be on the ship piling bales of goods in a mat to be lifted overside to his fellow worker on the dock, the next, himself receiving the bales as they come over the side on to the pier. During the whole process he is working for the same employer, usually also a local man, a local stevedoring contractor, only rarely, the owner of the ship, and to him and his employer, both shore work and ship work are one and the same job, entered into under the same contract.

It was only recently that the courts decided that the law of the sea applied even to the work done on the ship by these local laborers, especially where they had no contract with the ship, but were employed by a local contractor. In fact so little was it formerly believed that admiralty law necessarily affected even the contract of the stevedoring concern with the ship that even as late as 1889 it was only with great hestitation and after balancing decisions *pro* and *con* that it was decided that a longshoreman employed by the ship could sue her in the admiralty court for contract. *The Gilbert Knapp,* 37 Fed. 209. And only in 1914 was it finally held, after conflicting decisions in the lower courts, that a longshoreman, employed by a local contractor, could sue him in admiralty for a tort. *Atlantic Transport Co.* vs. *Imbrovek,* 234 U. S. 52. We are not contesting the doctrine, but we believe that the fact that the sea borne commerce of the United States flour-

ished under a rule which applied the shore law of its state to the whole occupation of the local longshoreman, is evidence that there is no vital need that a uniform maritime law apply to the half of a longshoreman's job carried on aboard ship.

That the land part of the longshoreman's job is subject to the local state law was decided by a unanimous court *State Industrial Commission* vs. *Nordenholt Corp.*, 259 U. S. 263, and therefore that the state compensation law applies to any ships entering New York harbor and discharging or taking on cargo. As a result in practice, the exclusion of the same law from application to the part of the longshoreman's job on the ship, had the effect not of securing uniformity of law applicable to ships in every port, but actually brought about a *diversity of law on each longshore job* in each port. The ship must insure her liability under the state compensation law for the longshoremen, while working on the dock at discharging or loading her cargo, so what can be gained by preventing that same law from applying to the work done on board, if the owner wishes? Certainly the burden on commerce is not lessened.

POINT III.

In the normal case of unloading or loading a ship the work is done by independent local contractors, not the ship, who employ local men and all of whose work is local. As to them uniformity is only possible by allowing the state law to apply to work done on water as it does to work done on land.

In laying down a rule to govern the rights and remedies under the contract of a longshoreman, the court should consider, not the exceptional case of a ship contracting directly with longshoremen but the normal case where a ship owner makes a contract with an independent local contractor, a master stevedore, to discharge a cargo, and that local contractor hires the longshoremen. So far as the crew aid in the work, so far as officers of the ship superintend it, a different situation obtains. They are bound by contract with the ship, they are not local but transitory workers. Their rights are governed by the peculiar law of the sea affecting seamen; their right of recovery is quite different from that of the longshoremen. The latest expression of this clear distinction between seamen and longshoremen is § 20 of the Merchant Seaman's Act, 1920, which gave to seamen and not longshoremen the same rights as the employees in interstate commerce. We shall later revert to this question of the difference in law between seamen and land workers at maritime work.

In this usual case the employer is a local business concern, the employee is a local workman, the job is

done locally. The employer is subject to the local compensation law in respect to the longshore work done on the dock, the job is legally a local matter as to that half of it, and it is surely not in the interest of commerce or necessary for the "proper harmony" and uniformity of the admiralty law in its "interstate and international relations" that the admiralty law be applied to the maritime part of the job. The situation is on all fours with that in *Grant-Smith-Porter Co.* vs. *Rohde,* except only that the contract of employment was maritime, which did not prevent the local law from being applied in *Western Fuel Co.* vs. *Garcia.* The employer is necessarily subject to the local compensation act in respect to this whole land employment, including half of the longshore job; his interest is in a uniformity of law applying to the whole job and not a situation which will compel him to cover his risk on the ship under a different law from that which covers his risk on the dock. Premiums of insurance are fixed on the pay roll and it will be impossible to fix the amount of wages which should be allocated to the ship and to the dock when the same individuals frequently pass from one to the other; as a result the premiums in each case will overlap, and the employer will be required to pay more than he could in case a single law applied.

In considering this question in previous cases the court has repeatedly said that it would give great weight to factual considerations. No better illustration of the need for holding that the longshoremen are engaged in a local occupation is to be found than in

the figures relating to the employment of longshoremen in New York City. There are in all about 24,900 longshore workers in the Port of New York, and of their employers 126 are stevedores coming within the terms of the State Compensation Act as to their whole labor force, unless longshoremen while on the ship are excepted, and only 8 are shipping companies. These eight steamship companies employ about 250 men each, making only some 2,000 men who are employed by shipping companies directly rather than by the local independent contractors, while 22,900 are employed by local employers. *This makes a ratio of 11 men employed by local contractors to 1 taken on by a marine company.* Bearing these figures in mind it is easy to see why the longshoremen believe that they are doing local work and should have the benefit of the local compensation statute.

On the point of the effect of the admiralty rule in operation upon local workers, employed in drydocks and about ships, the Committee on the Judiciary of the House of Representatives says in its report on the Act in question in this case:

> "Economically, port workmen and seamen are distinct. Said a representative of the New York and New Jersey Dry Dock Association at the Hearing before the Committee on the Judiciary on H. R. 5351:
>
> 'I think everyone who has given this question consideration believes in the advisability of a uniform Federal Statute covering seamen who are

peripatetic individuals, if I may use such a term in connection with sailors, and that the local workers—the longshoremen and repairmen—should come under the State laws for this reason. The Supreme Court has said that uniformity is desirable, and it is so far as sailors are concerned. I represent the dockmen who are essentially engaged in work along the coast. So far as the workers are concerned, they are men of fixed habitation, and it is thoroughly desirable that their compensation should be in general accord with that of other workers in a similar capacity, working in a shipyard, and it is merely desirable that they should have compensation covering them throughout their employment.' "

67th Congress, Second Session, Report No. 639. *Status of Longshoremen.*

We append the Reports of the Committees on the Judiciary of the Senate and House on the act of Congress of June 10, 1922, 42 Stats. 634, amending sections 24 and 256 of the Judicial Code to permit state workmen's compensation acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels.

POINT IV.

Many manufacturers, brick makers, lumber and coal dealers employ temporarily to load and unload the men usually employed in their local occupations, whose work though maritime in its nature is local.

A serious condition will arise in the case of the myriad of employers whose workmen occasionally load or unload ships or barges. A typical case is that of *Keator* v. *Rock Plaster Mfg. Co.,* 224 N. Y. 540. There the *Rock Plaster Company* had sent its own employee to the dock to aid in unloading a barge, evidently its common practice, and he was hurt while engaged in the work.

Another instance is the case of the brick yards which are near the water and ship their product in barges or schooners. Their own men are called from work in the yards and put to wheeling brick from the dock to the barge and piling it on board. These men the employer insures and must insure under the state compensation act. Their employment is local in the yards and in the loading process so far as an indeterminate point on the gangplank, it then becomes abruptly maritime. Clearly no national interest would make it necessary that the beneficent provisions of the state compensation law to which the rest of their employment is subject, should cease to protect them in the barge or ship. Another very usual instance of incidental maritime work occurs in the case of coal trade. Coal yards

on the shores of navigable waters, manufacturers whose plants can be reached by barges or ships, are accustomed to send their men employed usually on exclusively shore work, to unload the cargoes of fuel which come to their docks.

So very common is it for an employer to have some maritime work done in connection with his business, that in one large state compensation fund 40% of the employers insured, as having incidentally some maritime work done, were affected by the rule destroying uniformity of law in respect to the land and the maritime parts of their work. (67th Congress, 1st Session, Report No. 94, Senate, p. 3.)

Here in an exaggerated form is apparent the confusion which would ensue from the employer's side if a separate law must cover all work done under a maritime contract, for the great majority of the cases were loading or unloading barges or vessels, or work on ships which had been at sea. To lay down the rule that because work is done under a maritime contract it must be held to be subject exclusively to admiralty law, would cause such evident confusion in these cases, that we are confident that the court will not so hold.

POINT V.

As to the longshoremen who are local men working in one locality, usually under local employers, uniformity can only be attained by allowing state law to apply to work on the ship as it applies to work on land.

It is vitally important to the longshoremen that the benefit which they are now getting under the state compensation acts be not cut off. It is also of great importance to them that a single uniform law govern the whole longshore job, the shore part as the ship part. The Longshoremen's Union emphatically believes that on the basis of its experience the longshore job should be treated as local and uniformity be assured by allowing the local law to apply to the work done on the ship. The Union has over 140,000 members in the country at large, and 60,000 in New York State; it represents men scattered all over the United States, and on their behalf it prays its court not to sacrifice the unity in the law of compensation on the job for a unity of the law of the ship which we have previously shown to be wholly illusory even as to the ship.

The longshoremen are local workmen who form part of the local labor force in the cities where they work. They do not sail from port to port as do seamen, they go to work in the morning from their homes to which they return at night. They have ever been distinguished from seamen, the privileges of the Marine Hospitals are not for them. They are not granted the rights of recovery of damages given to seamen under

§ 20 of the Merchant Seamen's Act of 1920; in lieu they have had the medical care and the benefits given by the compensation laws of the several states to all the local employees with whom their work local in its nature, assimilates them.

This uniformity is doubly important to its members. For them a longshore job is a single job, for a single employer under a single contract of employment. They know their rights under their local compensation act, they are acquainted with the procedure, they realize that they are getting the same treatment as their fellows in the labor world of their own state, they ask no more. They are not like seamen traveling from one port to another, following the course of world commerce, as it may shift from one trade route to another; they are bound to the city in which they live, dependent as are their fellows in the city and state and their employers upon the fortunes of the local community.

They and their employers have adjusted themselves to the existing situation. Both sides are working under the state law, and there is no evidence which has come to their knowledge, that this has unduly burdened the industry. It would create a very serious situation if these rights were suddenly taken away, and they were forced to rely on the antequated maritime law of damages in case of accidents happening on the ships. The number of those accidents is very large. About 25% of the cases handled by the Compensation Commission in New York City, are the result of longshoremen's injuries; at least half happening on the ship. Industrial

peace is an important element in the prosperity of American trade, and confusion of laws on so important a question will not tend towards that relative contentment of mind from which alone it can come.

The longshoremen deliberately prefer to remain under state compensation laws. The state acts apply to them all the time and in all employments. Their provisions differ widely in different states, in respect to maximum and minimum of cash benefit, to provisions for survivors, to the important medical benefit, and as to details of administration. No federal compensation act could agree with the statute in any state, and discontent would inevitably result from the variety in provisions and in administration. Furthermore, under a Federal statute based either on the commerce clause or on the admiralty power, there would remain a wide fringe of cases in which it would be uncertain whether state or federal act applied. The complicated questions of when is an act in commerce, which have sent to this court so many cases in relation to railway employees, would arise again here. The maritime power is clearly unsatisfactory as a basis for compensation. It does not extend to the shore, and cannot there displace the state act, it confuses the district groups, the longshoremen and seamen, with widely varying legal rights at present. The expense and confusion of being subject to two separate jurisdictions, the state for some accidents, the federal for others, is apparent. More serious is the delay in payment of benefit and in medical treatment which would ensue from a divided jurisdiction over a

single job. In the many border line cases which would inevitably appear, the two systems of compensation would each try to put the burden on the other and in the contest between them, the unfortunate worker would suffer.

POINT VI.

An elective compensation law may supplement the maritime law of torts.

In *Grant-Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, a carpenter working on a ship, not yet completed, was injured while the ship was in navigable waters of the State of Oregon. Oregon had an elective compensation act which employer and employee had accepted. The Supreme Court expressly said that the carpenter would ordinarily have had a right to sue in admiralty for a tort in respect to the injury. However since he and his employer had accepted the elective compensation act of the State, they were subject to that law and Rohde could only go to the state compensation commission for his compensation under that law. The state elective law "supplemented and modified" the admiralty law of torts, which still remained in force to apply to maritime accidents not happening to persons under the elective compensation law. So the maritime law of torts, in itself, is not "a characteristic feature of the general maritime law" which cannot be supplemented by state law. A state elective compensation act may, even as to persons who have accepted it, exclude the operation of

the maritime tort law and will not "work material prejudice to any characteristic feature of the general maritime law."

It is true that the state law may thus modify the maritime law only in local matters, but the point made here is that this case is authority for the position that the maritime law of tort may be supplemented by an elective compensation law, and in this case it is the same law, the maritime law of tort, which is concerned. Though the longshoreman in this case was working under a maritime contract, he is not suing in contract but in tort.

The determining consideration then must be whether the work is so far of a local nature that the application of the state law will not "interfere with the proper harmony of that (maritime) law in its international or interstate relations." We repeat that it is only from a study of the law in its operation, the law applied to the facts, that this can be determined.

POINT VII.

The court has permitted the state law to change the maritime law regulating torts to a longshoreman by permitting the recovery of damages for death; it has frequently allowed maritime contracts to be regulated by state laws and to displace existing maritime law.

It remains to consider whether the circumstance that work is done under a maritime contract, prevents its being local so that the maritime law only can apply. The decision of *Western Fuel Co.* vs. *Garcia* is a conclusive answer in the negative. There the longshoreman was killed on a ship, and the state law granting damages to certain persons in case of death, was applied to his case, the court saying that *"the subject is maritime and local in character"* (italics ours). This point was emphasized in *Grant Smith-Porter Co.* vs. *Rohde* when the court said, "In *Western Fuel Co.* vs. *Garcia* we recently pointed out that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court." So a principle applied in a case of

injury under a maritime contract, was held to permit the application of the state elective compensation act.

The court in the *Rohde* case, after stating the principle, does insist on the point that *Rohde* was not working under a maritime contract but this can be reconciled with the *Garcia* case and with the court's own words just quoted, only if it means that employment under a maritime contract is one of the elements which must be considered in deciding whether a particular application of the local law is to be permitted. The court could not have meant the clear contradiction with itself implied in the theory that the fact that the employment under a maritime contract must be regulated by maritime law. Notably is this so in cases like longshore contracts where half of the job is admittedly local.

Furthermore the *Garcia* case does not stand alone as authority for the proposition that the maritime law in respect to contractual liability may be modified by state law. In *Cooley* vs. *Board of Port Wardens,* 12 How. 299, the pilotage law of Pennsylvania was held valid although "regulations of navigations", p. 316. The pilotage contract was by that act imposed on a ship and the existing law changed as Judge McLean declares in his dissent at p. 323.

Maritime insurance is a maritime contract, *Insurance Co.* vs. *Dunham,* 11 Wall. 1, but the states have freely regulated and have changed the formerly existing rules of contract applying to these contracts. For example § 169 Insurance Law of New York changed

entirely the old rule of marine insurance that any person could effect insurance "for whom it may concern" by limiting the right to person with *bona fide* interest. *Hagedorn* vs. *Oliverson,* 2 M. & S. 485.

Respectfully submitted,

HENRY C. HUNTER, *amicus curiæ* and attorney for Council of American Shipbuilders, Inc., and New York & New Jersey Dry Dock Association.

JOSEPH P. CHAMBERLAIN, *amicus curiæ* and attorney for Longshoreman's Union of America.

APPENDIX A.

67TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 639.

STATUS OF LONGSHOREMEN.

JANUARY 31, 1922.—Referred to the House Calendar and ordered to be printed.

Mr. CHANDLER of New York, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany S. 745.]

The Committee on the Judiciary, to which was referred the bill (S. 745) to amend section 24 and section 256 of the Judicial Code, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

This bill is intended to carry out what the committee believes, after careful consideration, to be the correct solution of the problem of providing compensation for port workers. Previous to the decision of the Supreme Court of the United States in the case of *Jensen* v. *Southern Pacific Co.*, no difficulty had arisen on this head and the courts and administrative authorities had acted on the assumption that the State law could grant compensation to these as well as to other

workers within the State. (*Lindstrom* v. *Mutual S. S. Co.,* 132 Minn., 328; *Kennerson* v. *Thames Towboat Co.,* 89 Conn., 367; and *North Pacific S. S. Co.* v. *Industrial Accident Commission,* 163 Pac., 199; *Southern Pacific Co.* v. *Jensen,* 215 N. Y., 514.)

The *Jensen* decision held in the case of a longshoreman employed by a ship, who was injured under circumstances amounting to a maritime tort, that the compulsory compensation law of New York State could not apply. They considered that the cost of providing compensation in all the ports called at by a ship, and the differing compensation laws in different States would be a burden on commerce and a substantial interference with the uniformity of maritime law.

That decision in the interest of uniformity for the shipowner overlooked uniformity for the workmen or uniformity for the large class of employers within the State, part of whose work was maritime, while the rest was necessarily covered by the State compensation laws and for whom the uniformity provided for the shipowner meant confusion and lack of uniformity. Since the decision in the *Jensen* case the courts and the compensation commissions have been confronted with many difficult cases well illustrating the confusion into which the *Jensen* case had thrown the various trades affected by the decision. The effects of this confusion were clearly brought out in the hearings before the committee by representatives of the employers and by representatives of the employees affected.

DRY-DOCK WORKERS.

Economically, port workmen and seamen are distinct. Said a representative of the New York and New Jersey Dry Dock Association at the hearing before the Committee on the Judiciary on H. R. 5351:

> I think everyone who has given this question consideration believes in the advisability of a uniform Federal statute covering seamen who are peripatetic individuals, if I may use such a term in connection with sailors, and that the local workers—the longshoremen and repair men—should come under the State laws for this reason. The Supreme Court has said that uniformity is desirable, and it is, so far as sailors are concerned. I represent the dockmen, who are essentially engaged in work along the coast. So far as the workers are concerned, they are men of fixed habitation, and it is thoroughly desirable that their compensation should be in general accord with that of other workers in a similar capacity, working in a shipyard, and it is merely desirable that they should have compensation covering them throughout their employment.

LONGSHOREMEN.

It is easy to understand the reason why the representatives of the workmen ask for compensation under State laws. The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into dif-

ferent jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not.

PART-TIME MARITIME WORKERS.

The large class of employees who occasionally work at loading or unloading vessels are subject to the State laws when at their actual tasks. They get compensation at State rates and under the conditions laid down in State laws by State commissions. If, in accidents happening during their longshore work, they are subject to a different law, the lack of uniformity will be the element in the situation which will strike their minds. That this class is in the aggregate large is evident. Maritime jurisdiction is not limited to the great seaports. The thousands of canal boats and barges tied up to the docks of manufacturing establishments, loaded with coal or raw materials, are subject to the admiralty jurisdiction just as much as an ocean liner at the dock in New York or Baltimore. These barges and canal boats are manned by a crew of one, so that the work of handling cargo is necessarily done by em-

ployees of the local plant. It is clearly desirable that in such circumstances the local law should govern the whole employment and that the men should get the same compensation whether they are injured working on the coal heaps of a manufacturing concern or barges at its wharf. This is but one instance of the many which will occur to the minds of men informed on the variety of the navigation, inland as well as seaborne, of this continent.

EMPLOYERS IN MARITIME WORK WHO ARE NOT SHIPOWNERS.

For the employers of part-time maritime workers to be taken out of the State system of compensation for the maritime side of their work means confusion and annoyance as well as expense. They must keep account of the time spent in maritime work, and their attorneys will be forced to spend long hours in deciding what is and what is not maritime employment. They must insure their separate risks, and when the inevitable conflicts of jurisdiction arise between insurance companies, both master and man must await the issue before payments to the injured workman can begin. In order to secure uniformity for shipowners in all their ports of call, confusion of law for these classes of workmen and employees should not be called into being.

Very commonly, too, the employing stevedore is not the shipowner or the ship captain, but a local firm with offices on shore. Then there is again no question of lack of uniformity involved if the State law is permitted

to govern. Neither employing stevedore nor longshoremen leaves the State. Both remain in the port subject to local law and to local administration in exactly the same way as in case of employer and employee in a local warehouse or flour mill. But where the employing stevedore does not limit himself strictly to longshore work, if he employs his men at any other employment, as will frequently be the case, then if he is to have uniformity, it must be under the State law.

SHIPOWNER.

Only for the shipowner will uniformity result from preventing the application of State compensation laws, and the claims of this small class should not overweigh the needs of the other interests. Even a shipowner is more annoyed than burdened. Where he employs a large number of repairmen or longshoremen in a regular port of call he is not unduly burdened by the obligation to insure compensation. He has a superintendent at an office in the port, who can easily secure the protection as a part of his regular duties. If the company is a self-insurer, it must maintain an organization to take care of its risks, an organization with representation in each important port, so that it does not make a great difference whether those in one port act under the local laws while those in another must take care of accidents under another act. Before compensation, their liability for accidents to longshoremen varied in each State in accordance with the tort law, but no complaint was made of an undue burden because of this lack of uniformity.

COST OF COMPENSATION.

At the hearing the shipowner's representative stressed the cost of the New York compensation law, but his clients were not treated differently from other New York employers. No burden was laid on American shipping, since all ships, foreign and domestic, were affected. If, however, a Federal compensation act were substituted he could not have substantially less costs unless the act carried substantially less benefits, and in such case a serious source of discontent would be introduced into the relation of capital and labor. A local laborer, a longshoreman, would find it hard to understand why his benefit was appreciably less than that of his neighbor, not employed in maritime work. An employee only occasionally employed at unloading barges would not appreciate why he should receive less if hurt at such work under the same employer than if he were working elsewhere in the same plant.

The important principles of compensation are promptness in payment and simplicity in procedure. Confusion of jurisdiction will stand squarely in the way of realizing them.

CONGRESS HAS REGULATED SEAMEN.

Congress has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relation of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed,

the food to be served to them, hours of labor, reciprocal duties of seaman and officer. A Federal statute changed the age-long maritime rule which subjected a sailor leaving his ship to arrest, and made his return on board imperative. The rights of a seaman against the shipowner in case of injury or sickness are not at all similar to those which govern the right of recovery in the same case in land employment. The owner must care for the sick or injured sailor; he must pay his wages until the home port is reached and then the United States Marine Hospital Service takes him into its protection till he is recovered to health. He is thus already to a degree protected by a form of workmen's compensation, since this duty of the ship and the care in the marine hospitals does not depend upon any fault imputable to the owner. His right to recover damages was strictly limited by the law of the sea, but Congress in the merchant shipping act of 1920 gave him a wide right to recover damages by putting him on a basis with the employees in interstate commerce.

PORT WORKERS UNDER CONTROL OF STATE.

Congress has hitherto left to the State control of the relation of master and servant in longshore work or in ship repair. State, not Federal, statutes require one day's rest in seven in these trades; State, not Federal, statutes regulate conditions of labor among these men of fixed habitation, and it has been, as a rule, in the State courts and under the State law that has been determined the duty of the employer to pay damages to

his employee injured in the service. Even where the employee had an opportunity to sue for maritime tort in the admiralty courts, he has not, in the main, attempted to avail himself of it, but has pursued this remedy in the tribunals of his State. Congress would be going far if it assumed control of the whole relation of master and servant in longshore and ship-repair work. It would even be doubtful whether Congress can regulate that relation on shore, and if Congress intends to leave in the main the regulation of this relation to local legislation, it seems desirable that the whole of the relation, so far as can be, should be left to the local law. As we have shown, the rights of seamen to recover damages for tort are bound up with their rights to maintenance, cure, and wages, and the other regulations of the relationship of master and servant at sea governed by act of Congress or by the admiralty law.

POWER OF CONGRESS.

This being clearly the desirable solution of the problem, has Congress the power to enact this legislation? The Constitution of the United States was conceived, not in a small narrow sense, but as an instrument for the government of a continent. The fathers intended that local affairs should be left to local control and that local responsibility should be developed by exercise of local government. They knew from experience, however, that national affairs should be regulated nationally and that local prejudices or local interest should not be allowed to stand in the way of national treat-

ment of problems not local in their scope. Certain powers they expressly cut off from the State, certain powers which they conceived as exclusively national they intrusted wholly to Congress, but in a wide range of important questions which they conceived of, neither as exclusively national nor exclusively local, they vested in Congress the power of control without refusing to the States the right of regulation so long as their regulation did not interfere with national interests. This question of the admiralty jurisdiction and the cognate problem of interstate and foreign commerce are the fields in which this supervision of Congress has been especially exercised. Where uniformity is not essential in maritime matters, the courts have upheld the rights of the States to pass legislation. The State legislation regulating the pilotage in the different States and, therefore, regulating a maritime contract (*Hobart* vs. *Drogan*, 10 Peters, 108) and imposing a charge upon shipping, compelling even vessels which did not hire pilots to pay half pilotage, has been held unconstitutional as "enacted by virtue of the powers residing in the State to legislate." The case for congressional action on pilotage is stronger than in respect to these harbor workers. The pilots are in themselves seamen, and the persons who must pay the fees are exclusively shipowners, while in the case of the harbor workers the persons affected are landsmen and their employers are usually themselves land workers, so that the ship is not subject to lien or to suit in admiralty. When the pilotage cases were decided, it was not supposed that

there was any requirement of uniformity in the maritime law which would interfere with local regulation of a maritime subject, so that the case here was decided on the power to regulate commerce, though the court expressly says that Congress had the power under its authority to regulate navigation to pass a general pilot statute if it felt that such action was desirable. The court said that there were many subjects in this wide field, some operating equally on the United States in every port and some, like the subject in question (pilotage laws), as imperatively demanding "that diversity which alone can meet the local necessities of navigation" (*Cooley* v. *Port Wardens,* 12 Howard, 299, p. 319).

Upholding a State quarantine law against a direct burden on ships, the court said the matter is one in which "the rule that should govern quarantines may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River 100 miles from the sea, may be widely and wisely different from that which is best for the harbor of New York" (*Morgan S. S. Co.* v. *Louisiana Board of Health,* 118 U. S., 455, p. 465).

In view of the great variety in compensation statutes throughout the country, the great diversity in regulations which the several States have established to govern the relation of master and servant, where no injury happens to the servant, it is clear that the reasoning

in these two cases applies to the land workers engaged in unloading or repairing ships.

The Supreme Court has always held that the States might change or add to the maritime law. The courts have applied to maritime torts State laws giving the right of recovery in case of death. (*American Steamboat Co.* v. *Chase,* 16 Wallace, 531; *Sherlock* v. *Alling,* 93 U. S. 99; *The Hamilton,* 207 U. S. 398.) In a recent pronouncement of that court on this question a statute of California giving such right of action was upheld and a section of that statute limiting the period in which the action for death could be brought was also adopted as part of the maritime law. (*Western Fuel Co.* v. *Garcia,* decided Dec. 5, 1921.) It again announces that the State statutes will be applied when it "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (Quoting *Southern Pacific Co.* v. *Jensen,* 244, U. S., 205.)

Even more recently (*Grant A. Smith-Porter Ship Co.* v. *Rhode,* decided Jan. 3, 1922) the United States Supreme Court has stated as its controlling principal that "as to certain local matters, regulation which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by State statutes."

If Congress has left to the States in the past the entire regulation of the relation of master and servant, including the regulation of the payment of damages for

injuries, why should it not continue in the same authorities the right to substitute a better system of securing justice to injured workers in these trades? As it affects the workman he may fairly say, with the Supreme Court of Maine, that "he insists that this court make their contract to square with the demands of real justice and plain common sense, that his right in the dual citizenship of State and Nation may not be unjustly infringed, and that the remedial legislation out of which the contract of labor sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal, and full." (*Berry* v. *M. F. Donovan & Sons,* 115 Atl., 250.)

Can Congress act as provided in this bill? In 1789, the First Congress under the Constitution passed the judiciary act, giving to the district court of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," and this is the law to-day. (Judicial Code, sec. 24 and 256.) Under this clause State law, as it was at the time of suit, has been applied by State courts tc cases arising under maritime contracts or as a result of maritime tort. "Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contract or for maritime torts can be maintained in the State courts." (*Manchester* v. *Massachusetts,*

139 U. S., 240, p. 262; *Atlee* v. *Packet Co.*, 12 Wall., 389; *Rounds* v. *Cloverport Foundry Co.*, 237 U. S., 303.) The principle was applied to torts happening as a result of a collision on navigable waters. (*Steamboat Co.* v. *Chase*, 16 Wall., 522; *Schoonmaker* v. *Gilmore*, 102 U. S., 118.) The authority of the State courts under the saving clause in cases of maritime torts has been recently discussed at great length by the Supreme Court of Massachusetts in *Proctor* v. *Dillon*, 129 N. E., 265, and the conclusion reached that the State courts must administer the State law.

If Congress could by this statute authorize the State legislatures to enact and the State courts to apply rules regulating the admiralty jurisdiction and preserve to suitors their common-law rights, why can it not, following the enlightened opinion of the age, which has substituted compensation for the right to sue for damage at common law, permit the local jurisdictions to provide compensation for workmen who are, as to all other matters, within their jurisdiction.

There is another reason why the compensation laws of the State should be allowed to take effect. The jurisdiction of admiralty is strictly local. Accidents happening on the land are not maritime torts and no suit can be brought in the admiralty courts to recover for damage resulting therefrom. *Keator* v. *Rock Plaster Co.* (256 Fed., 574) is the last expression of this rule. It has been frequently decided that the admiralty jurisdiction can not be extended by act of Congress, so that a Federal statute permitting recovery for

a tort happening on the shore would be an invasion of the reserved rights of the States. (*The Blackheath*, 195 U. S., 361, Hughes on Admiralty, 2d ed., p. 195.) Therefore, so far as the relation of master and servant on land is concerned the State laws will always provide regulation of the duty of the master to make payment for an injury happening on shore. The State courts and compensation commissions have no general rule to follow in such accidents. In New York the court, though not unanimously, holds that the State compensation law can not apply to accident happening on land, but that the State law of tort must be resorted to for a remedy (*Docy* v. *Howland*, 224 N. Y., 30), while in Maine the Supreme Court has recently held that their compensation law shall be applied where the accident happens on the dock. (*Berry* v. *Donovan*, 115 Atl., 250.) But the longshoreman should be subject to the same law during the whole period of his work. If he is inevitably to be governed by the State law as to a part of his employment he should be permitted to have the benefits of that law during his whole employment.

Consequently, so far as accidents on land are concerned, the State law, either of torts or of compensation, must continue to provide a remedy for work accidents. Congress may have power to enact a compensation law for these accidents. Under the admiralty provision, Congress can not shut out the right of the States to provide a concurrent remedy in tort. The right to a remedy for injury is confirmed in the constitutions of many States. (Injury to persons to have

certain remedy, Ark., 11, 13; Minn., 1, 8; Mo., 11, 10; N. H., 1, 14; Okla., 11, 6; Wis., 1, 9.) (Every person ought to find certain remedy in laws for injuries he may receive to person, Ill., 11, 19; Mass., Pt. 1, 11; R. I., 1, 5; Vt., 1, 4.) (Injury to person to be redressed by due course of law, Conn., 1, 12; Del., 1, 9; Fla., D. R., 4; Ind., 1, 12; Kans., B. R., 18; Ky., 14; Me., 19; Miss., 111, 24; Nebr., 1, 131; N. C., 1, 35; Ohio, 1, 16; Oreg., 1, 10; Pa., 1, 11; S. Dak., Vi., 20; Tenn., 1, 17; Tex., 1, 13; W. Va., 11, 17.)

In some cases the amount to be recovered for death can not be fixed by law. (Right of action to recover damages for injuries resulting in death not to be abrogated, and amount recoverable not to be subject to statutory limitation, Okla., 111, 7; Utah, XVI, 5; N. Y., 1, 18, 19.) (Legislature to have no power to limit amount to be recovered for injuries resulting in death, Ky., 54.) (Amount of damage recoverable by civil action for death caused by wrongful act, neglect or default of another, not to be limited by law, Ohio, 1, 19a.) (Legislature not to limit amount to be recovered for injuries resulting in death, but in case of death from such injuries, right of action to survive, and legislature to prescribe for whose benefit action to be prosecuted, Ark., V, 32; Pa., III, 21.)

So that complete uniformity of law in respect to longshoremen and marine workers in the interest of shipowners is not possible without changing, not the laws but the constitutions of the States.

The legislation provided by this bill, which would amend sections 24 and 256 of the Judicial Code, so as to fix the status of longshoremen, is imperatively necessary as a matter of simple justice not only to longshoremen themselves but to their employers as well.

The situation as it exists to-day is exceedingly confused and disconcerting with reference to remedies depending upon the peculiar character of the longshoreman's employment at the moment of injury. If he is working on a dock moving freight from one pile to another, the compensation law of the State applies. If he is injured while working on the vessel, moving freight, his remedy is under the maritime law of the United States. And if he happens to be injured while working on a gangplank, a kind of twilight zone between sea and land, both his status and his remedy are uncertain. To add to the confusion and annoyance, if the longshoreman happens to be shifting freight that is moving in interstate commerce, he has no remedy under the compensation law of the State of New York, but must apply to the State courts for his remedy under the common law of torts.

This extremely confusing situation is doubly deplorable, for it works not only a great injustice to the men themselves, but to their employers as well, who are compelled to carry double insurance, first, under the employer's liability act of the State, second, insurance that will protect themselves against the different kinds of liability that may arise under any one of the classes of cases just mentioned.

The importance of this question and the necessity for this legislation are apparent when we consider that in the State of New York alone 10 per cent of the accidents reported are accidents to longshoremen, and that no less than 84 accidents were reported as occurring in the loading of a certain vessel in the port of New York.

There is little doubt that the legislatures of the States assumed that the various compensation acts passed by them would apply to longshoremen, even though they should be injured while temporarily employed on vessels, but in the case of *Jensen* v. *Southern Pacific* (244 U. S.) the Supreme Court held otherwise, declaring that the application of the New York State compensation law, or the compensation law of any other State, would tend to destroy the general uniformity of the maritime law.

In closing, attention is directed to the fact that the law held involved in the Jensen and Knickerbocker cases differs from the law provided by this bill in that it applied not only to longshoremen, but also to the sailors on board, while the law provided by this act is intended to apply only to longshoremen. Furthermore, it is contended that the relationship of longshoremen to commerce is local in character, and, as such, may properly, as in the case of pilots, be governed by State statutes.

APPENDIX B.

CALENDAR No. 108.

67TH CONGRESS, 1st Session. | SENATE. | REPORT No. 94

EXTENSION OF BENEFITS OF THE STATE WORKMEN'S COMPENSATION ACT TO SEAMEN, ETC.

JUNE 6, 1921.—Ordered to be printed.

Mr. BORAH, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany S. 745.]

The Committee on the Judiciary, to which was referred the bill (S. 745) to amend section 24 and section 256 of the Judicial Code, having considered the same, report favorably thereon with the recommendation that the bill do pass with an amendment.

This bill is intended to meet the very serious situation which has arisen as a result of the decision in the Supreme Court that the Johnson amendment, act of October 6, 1917, was unconstitutional. (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149.) That amendment was intended to permit the extension of the benefits of the State workmen's compensation laws to seamen and other workers on or in connection with ships, who had by

the decision in the *Southern Pacific Co.* v. *Jensen* (244 U. S., 205), ceased to enjoy the protection of these laws and had been thrown back upon the relief which they could get either under the maritime law or the local law of torts. The class of longshoremen needs the protection of compensation as much if not more than any other class of workmen. Their occupation, so essential to the prosperity of the trade of the United States, is extra hazardous, both on account of its nature and on account of the pressure under which it must often be performed. It is unjust to these men and to their families that the burden of loss resulting from thousands of accidents annually should be left by the law on their shoulders. The resulting discontent and dissatisfaction is easy to understand. The ship-repair men form also a large class among whom injuries are frequent, and they find it difficult to understand why the carpenter, brass worker, or plumber employed to repair a ship in the harbor should receive no compensation, while if he were employed in a building on the dock, he would be protected by the State compensation law.

DISTINCTION BETWEEN SEAMEN AND LANDSMEN WHO WORK ON OR IN CONNECTION WITH SHIPS.

There is a clear distinction between the two classes, seamen and landsmen, who work in or about ships, who were confused in the Johnson amendment and in the situation which arose in the *Jensen* case. The distinctions are based upon the facts of their employment, upon the separate system of law which have hitherto been

applied them, and the character of employers which, in case of seamen, are ships or shipowners, and in the case of landsmen in the main, independent local contractors. The seamen in their normal life are migratory. They pass from port to port, from State to State, from country to country. To permit in their case the application of the varying laws of the several States in respect to injuries suffered in the course of their employment would be unfair both to the ship and to the seamen. Under these laws a seaman might be entitled to different amounts of compensation for different periods. different medical attention, depending upon whether an accident happened in the port of New York or the port of Philadelphia, or in New Orleans. The owner would be compelled to insure against an uncertain liability for he could never tell when his ship started out under what law he might be required to pay compensation. This difference not only argues against the application of State compensation laws but against the application of the general police legislation of the States in the relations of seamen to their employer. Seamen are subject to a special law of the sea which in the United States is nation wide. Congress legislates in respect to the conditions of employment of seamen and their relations with their employers. The rights of a seaman when injured in the course of his employment are governed not by the common law of torts, but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care,

and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the United States Marine Hospital is open to him without expense on his part until he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (*Sheude* v. *Zenith S. S. Co.*, 216 Fed., 566, 570.) The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the merchant marine act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions

of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen is inapplicable to their condition and no attempt has been made to apply it to them. They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident.

Their employers furthermore are not usually ships or shipowners. It is usual in the large ports for a local stevedoring firm to contract with the shipowner to load or unload his vessel and employ longshoremen, who, under his control handle the cargo.

Repairs are usually done under contract with a local contractor, so that the men who are actually employed in doing the work have no direct relation with the ship or shipowner. In nearly every case, too, the employers will have at least a part of their force covered by the State compensation law, so that for them uniformity will be secured only by putting the worker whom they employ in or about ships under the same State compensation law which governs their liability toward him when not so employed and their other employees.

GEOGRAPHICAL EXTENT AND COMPLEXITY OF THE PROBLEM.

Longshoremen and ship-repair men, especially the longshoremen, are not centered in the few great ports, and are not concerned solely with interstate or foreign commerce. Wherever a steamship or scow plies on

the internal waters of any State in the Union throughout the whole vast Mississippi waterways system, up and down the Hudson River, and on the great canals which link that artery of commerce with Canada and with Lake Erie, on the Columbia River in the Northwest, and the many streams carrying products of the South Atlantic States to the seaboard, are found the men who load or unload vessels or who work in their repair. In any one of the smaller river ports their number may be small and they may work only occasionally in connection with vessels, their regular employment being on land.

The extent and complication of the problem is graphically brought forward by the fact that 40 per cent of the employers insured in one large State compensation insurance fund employed men who were engaged to some extent in maritime work. For example, in the brickyards on the shores of the Hudson River it is customary for the regular employees of the brickyard to load the barges which then go down the river to the city where their brick are to be used, and, arrived at port, employees of the contractor who owns the cargo are taken off their strictly land work to unload it. A barge loaded with coal for a factory situated on a river or canal ties up to a factory wharf and a group of factory workmen are sent down to unload it. A vessel having a cargo of raw material for a factory ties up to a city wharf and the owner of the factory sends down his own foreman to superintend the unloading, and frequently members of his own force to

actually handle the cargo. Under these circumstances to compel the owner to secure compensation insurance for his land risk under a State act, often in a compulsory State fund, and cover his vague and uncertain maritime risk under a different law in a different carrier, would be unduly hard upon him. The employee, furthermore, would find it hard to understand why he should receive compensation differing in amount and differing in the method of recovery if he were hurt wheeling bricks in a brickyard or wheeling them on board a barge.

DIFFERENCES IN STATE COMPENSATION LAWS SHOW DIFFERING LOCAL CONDITIONS.

The compensation laws of the various States vary greatly in important particulars so that any attempt to cover longshoremen and repairmen while within the admiralty jurisdiction by a Federal statute will result in a great disparity between the compensation which men will receive in any locality under State and Federal statutes. The cash payments under compensation are usually a percentage of wages, limited by a maximum and a minimum. The percentage varies from 50 to 66 2-3 per cent in different States, the weekly maximum from $22.50 in Oregon to $7 in Porto Rico; the minimum from $8 in New York to $3 in Louisiana. Clearly a Federal statute fixing a single percentage of wages and a single maximum and minimum for the whole country will set up in every State a substantially different standard from that of the local law.

The widow, in some States, is provided for until death or remarriage. California provides for only 240 weeks and other States have other time limits.

The burial allowance is $200 in four States but in Porto Rico it is only $40. Total disability for life is provided in some laws and in others for limited periods, for but 260 weeks in Vermont, for example.

Medical service is unlimited in 16 States as to duration, while in Alaska and New Hampshire there is no medical care and in four other States it is limited to two weeks. The cost of medical care is unlimited in some States, but many fix the maximum, which in New Mexico, for instance, is only $50. Compensation begins at once without waiting period in Oregon and Porto Rico, but in Maryland and Utah, the waiting period is 3 days and in 10 States, including New York, it is two weeks. Different methods, too, are adopted in different States in determining how far an injury interferes with earning capacity.

It would be hard to explain to a carpenter injured while working on a ship why he should receive a different compensation than a carpenter injured on land, or why his medical treatment should be different. It would be doubly hard to explain to a laborer in a factory or brickyard why his weekly check should be more or less if he is hurt wheeling bricks in a yard or shoveling coal in a factory or doing the same work on a barge. Seamen are a special class and are accustomed to being treated as such. Longshoremen and ship repairers are not; they have in the past been assimilated with their

fellow landsmen, so that the reasons which would make it easy to explain to a seaman why his compensation should be different from that of other workers, would not exist in their case.

DIFFICULTY OF DETERMINING WHAT IS A MARITIME ACCIDENT.

The work of a longshoreman is partly on land, partly on the ship. He may be employed entirely on the dock in connection with a crane which lifts the barrels or boxes into the hold of the ship; he may be employed on the dock in shifting the barrels or boxes from one point to another to make them more convenient for the operation of loading; he may be busied on the ship in towing away the cargo, and he may be wheeling a truck from the dock up the gangplank to the deck of the ship. The admiralty courts have no jurisdiction to give him damages in tort for an accident in the course of his employment while he was on the dock; they have jurisdiction if the accident happens upon the ship and it is controverted under exactly what circumstances there will be admiralty tort while the man is on the gangplank. (*Keator* v. *Rock Plaster Co.*, 256 Fed., 574.)

In both the *Jensen* and the *Knickerbocker* ice cases stress is laid upon the circumstance that the accident involved was a maritime tort—that is, a tort which was subject to the admiralty jurisdiction. Says the court in the *Jensen* case: "The injuries which he [Jensen] received were * * * maritime, and the rights and

liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." In the *Knickerbocker* case the court said, referring to the *Jensen* case, that it concerned "a maritime tort," and they held the Johnson amendment unconstitutional, as an attempt to apply the workmen's compensation laws of the several States "to injuries within admiralty and maritime jurisdiction." It has been frequently decided that Congress has no right to extend the limits of the admiralty jurisdiction (the *Lottawanna*, 21 Wall., 558), so that it is very doubtful if Congress has a right to enact a statute covering accidents to longshoremen while off the ship.

Clearly the whole employment of a longshoreman must be covered by a single act if he is to receive satisfactory protection. He must not be left in doubt as to which jurisdiction he must apply for his compensation. He must not be forced to apply to one jurisdiction in the event that an accident happens on land, to another in the event that an accident happens on the ship, with totally different remedies in each case, and be in doubt as to where to apply if he is injured while in the "twilight zone." The employer, furthermore, should not be compelled to divide his compensation insurance risk between two separate statutes, with necessarily varying terms. Several of the States compel all employers to insure their State risks in a State fund, and in these States, if a separate Federal act is established for the maritime risk, many employers will be obliged to carry insurance with both the State fund and a Federal in-

surance carrier. Disputes between the carriers will necessarily frequently arise as to which is responsible, and the consequences will be a sacrifice of that promptness in granting the relief sought which is one of the important elements in compensation.

DIFFICULTY AND COST OF FEDERAL ADMINISTRATION.

At the present time practically all of the States of the Union have systems of compensation with an administrative organization, usually a commission, to administer them. Administration by the courts has been tried and has been usually rejected in favor of administration by a commission which has means of trying promptly the cases presented to it in the different parts of the State under a simpler form of procedure than that usual in the courts. It would be very costly to establish, beside the State commissions, a Federal system to settle the compensation for maritime accidents to longshoremen and repairmen. Maritime accidents affecting seamen can be handled in the ports to which a ship returns after its voyages or at which it touches. In most of these ports there is an admiralty court to which appeals from the commission, if a commission is established, can be promptly and easily taken and, furthermore, seamen are accustomed to admiralty procedure and to the methods of admiralty courts. The witnesses are usually on board the ship, so that they will be carried with the ship to the port at which the hearing can be held and the rights of the parties determined.

Longshoremen and ship-repair men are scattered along all the navigable waters of the United States, fresh as well as salt, so that an administrative organization to decide promptly all the cases of accident to these men would have to be very widely extended, and on account of the few cases in many of the smaller ports the relative cost of administration would be very high. The witnesses would not, as in the case of a vessel, be carried with the vessel to a large port where an injury could be held, but a commissioner would necessarily go to the place where the accident occurred, or witnesses, at great loss of time and heavy expense, would have to be brought to a center often far distant from their homes. In a time like the present, when economy is so important, the saving to the national exchequer, if the administration of relief for these accidents is left in the hands of the State authorities, is no unimportant consideration.

In the interest, too, of the injured workman and of his employer it is important that there should not be a question of jurisdiction involving both delay and expense in the many cases of doubt as to whether an accident is a maritime injury or not. The importance of this point in compensation is not limited to the question of cash compensation alone, since all compensation acts provide for prompt medical care. Where, however, there is a doubt as to whether the accident is maritime or not and an attempt is made to cover the maritime accidents by Federal statute the two separate carriers under the Federal and the State laws will dispute which

is liable, and not only will the payment of the cash compensation be delayed, but the essential medical treatment will be apt to be given too late to accomplish its due effect.

THE CONSTITUTIONAL QUESTION IS ONE OF REASONABLENESS.

The State legislatures are not entirely prohibited from dealing with questions involved in the maritime law. Says the majority of the court in the *Jensen* case: "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. That this may be done to some extent can not be denied," citing the cases holding constitutional State statutes giving a lien upon a vessel for repairs in her own port and conferring the right to recover in death cases. "Plainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

"A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established. Where the subject

is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations."

It could be fairly said that the State laws should not be applied to seamen, both because of the characteristic sea laws which govern the relations of employer and employee in that occupation and because of the interference with international and interstate commerce by water which might result from a change in legal status at each port at which the ship touches. The Johnson amendment, therefore, which applied to both seamen and other maritime workers, had to be held unconstitutional as a whole if the seamen were to continue to be governed by uniform statutes.

This bill avoids this difficulty. It does not permit the application of State legislation to seamen, so that the question presented is whether it will interfere with the characteristic features of the maritime law or the essential uniformity of the maritime law to permit the application of workmen's compensation acts of the several States to longshoremen and ship-repair men when under maritime jurisdiction. The characteristic law of the sea is not involved in the relations between these workmen and their employer, when, as will usually happen, the employers are not ships or shipowners, and even where they are ships and shipowners. The characteristic rules of the law of the sea affect seamen and

do not affect these land workers. So far as the laws of Congress protect ships and shipowners as such, those laws will not be affected by the application of the State compensation laws to this class of workman.

Whether it will seriously hamper commerce, to protect which the uniformity rule is invoked, to permit the application of the State compensation laws in this case is a matter of judgment based upon practical considerations. Congress may fairly be influenced by the fact that there was no such interference remarked prior to the decision in the *Jensen* case, and that there has been no great relief apparent to international or interstate maritime commerce since those statutes have ceased to apply to longshoremen and repairmen. No argument has ever been made to show on the facts that the application of these statutes would result in great injury to commerce.

Congress is the appropriate judge as to whether its own essential purposes expressed in its own acts are contravened by this bill.

Consideration of practical convenience both to employer and employee, of economy to the public, of promptness in the provision of compensation and medical care, all emphasize the importance of extending the State compensation laws to such local workers as longshoremen and ship-repair men during their whole employment and in extending those laws to the large class of men who are only from time to time and as a small part of their regular work occupied in loading or unloading vessels. The burden on maritime commerce

would be less under this rule than under a law imposing Federal compensation in case of maritime accidents, and great would be the burden upon and disadvantage to the employee and the employer from the necessarily discordant State and Federal laws applying to the same men and practically the same work under the same employer, as in the case of brickyard laborers, or from the inevitable confusion of jurisdiction which would arise in determining whether a longshoreman at a particular moment was or was not within the admiralty jurisdiction.

There is a strong precedent for leaving to the States the control of those questions which touch maritime jurisdiction in respect to which a uniform rule is not, in the judgment of Congress, desirable. By the act of August 7, 1789 (R. S. 4235), Congress expressly provided that all pilots should be regulated "in conformity with the existing laws of the States, respectively, wherein such pilots may be, or in such laws which the State may, respectively, enact for such purpose." Laws of the States regulating the contract of pilotage, the charge to be made by pilots, the conditions under which pilots must be accepted, have been frequently applied in the courts of the United States without opposition on the ground that these laws materially interfered with the unity of the maritime jurisdiction, although there has never been a doubt that suits for pilotage were within the admiralty and maritime jurisdiction of the United States. "The service is strictly maritime." (*Hobart* v. *Drogan*, 10 Peters, 108, p. 120.)

In the case of *Cooley* v. *Board of Wardens* (12 Howard, 299) the statute was upheld as a reasonable rule committing to the legislatures of the States a subject "imperatively demanding that diversity which alone can meet the local situation."

The opinion in the different communities as to what compensation should be provided for local workmen varies greatly. To endeavor to impose by act of Congress in the different communities a uniform rule which would suit the needs as locally understood of no one of the communities and which would apply to a group of local workmen in no essential different from other local workmen, would only tend to create new clashes between workmen and employers or insurance carriers, to confuse a subject, workmen's compensation, in which clarity is most essential, and to depart from the wise rule of leaving local matters to be disposed of by local authorities where a general national interest is not involved.

As in the case of the State quarantine laws, this matter is one in which "the rules that govern may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities." (*Morgan's R. R. & S. S. Co.* v. *Louisiana*, 118 U. S., 455, p. 466.)

Compensation should be the only remedy as between employer and employee for work accidents. This is an added reason for the passage of this bill. If Congress attempts by a general statute to provide compensation for these workers both on and off the ship,

their right to recover damages for a tort against their employer in the State court would still remain. Congress can not abolish it, and even did the State legislatures desire to grave constitutional difficulties would arise. In several important States, including New York, Pennsylvania, and Ohio, the legislatures are by their constitutions prohibited from limiting the recovery of damages in case of death, and in New York and other States the right of action in such cases can not be abrogated. Complete protection to the employer under a Federal compensation statute would not be possible.

Congress can, however, regulate the jurisdiction of the Federal courts. If this bill is passed the jurisdiction of the district courts over cases of maritime torts in the course of their employment to longshoremen and repairmen ceases, so that the employer who has complied with the State compensation law is fully protected.